RIGHTS IN TECHNICAL DATA AND COMPUTER SOFTWARE

AIR FORCE SYSTEMS & LOGISTICS CONTRACTING COURSE

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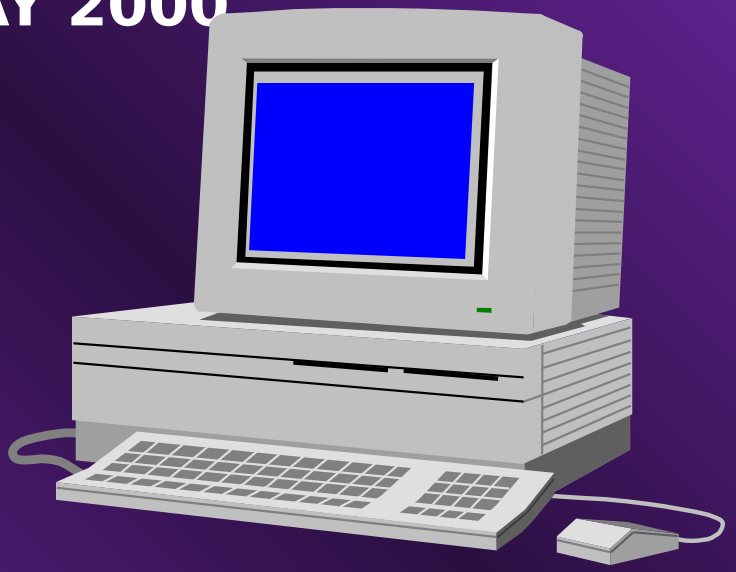

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RIGHTS IN WHAT?

- Technical Data
- Computer Software
- What About Traditional Intellectual Property Categories?

INTELLECTUAL PROPERTY

- Patents
- Copyright
- Trade Secrets
- Trademarks and Service Marks
- Defined by Contract (Primary Approach of the DFARS)

1988 DFARS & 1995 DFARS STILL COEXIST, BARELY

KEY DEFINITIONS

DEFINITION

- **Technical Data**
  - **Recorded Information, Regardless of Form or Method of Recording, of a Scientific or Technical Nature**
    - **Includes: Computer Software Documentation.**
    - **Does Not Include: Computer Software or Data Incidental to Contract Administration, Such As Financial and/or Management Information.**

DEFINITION

- Technical Data
  - Special Note
    - Tech Data Does Not Mean an Item.

      It Does Not Mean the Design for an Item. It Means the Recorded Info that Describes, or Illustrates, that Design.
    - "Rights in Drawings, Not Technology"

DEFINITION

- **Computer Software**
  - **Computer Programs, Source Code, Source Code Listings, Etc. Anything that Would Enable the Software to Be Reproduced, Recreated or Recompiled.**

DEFINITION

- **Computer Program**
  - **Set of Instructions, Rules or Routines Recorded in a Form Capable of Causing a Computer to Perform a Specific Operation or Series of Operations.**

DEFINITION

- **Computer Software Documentation**
  - **Manuals, Installation and Operating Instructions, and Other Similar Items, Regardless of Storage Medium, that Explain the Capabilities of the Computer Software or Provide Instructions for Using the Computer Software.**

DEFINITION

- **Computer Database**
  - **A Collection of Data in a Form Capable of Being Processed and Operated on by a Computer. Does Not Include Computer Software.**

TYPES OF RIGHTS

“LICENSES, NOT OWNERSHIP”

POLICY CONSIDERATIONS

POLICY CONSIDERATIONS

- U.S. Gov't's Interests
  - In Making Technical Data Widely Available
    - –Increase Competition
    - –Lower Costs
    - –Provide for Mobilization

POLICY CONSIDERATIONS

- U.S. Gov't's Interests
  - As a Buyer of Goods
  - As a Maker of Economic Policy

POLICY CONSIDERATIONS

- U.S. Gov't's Interests, Cont.
  - In Making Technical Data Widely Available
    - Often Requires Delivery of Data Essential for Military Needs, Even Though that Data Would Not Customarily Be Disclosed in Commercial Practice.

POLICY CONSIDERATIONS

- U.S. Gov't's Interests, Cont.
  - In Restricting Public Access to Technical Data
    - Encourage Contractors to Improve Existing Technologies and Develop New Technologies <u>at Private Expense</u> for Both Governmental and Commercial Needs.

POLICY CONSIDERATIONS

- Contractor's Interest
  - Developers Want to Restrict Public Access to Technical Data
    - Maintain Competitive Advantage.
  - But Make-to-Plan Contractors, or Parts Replicators, Want Compete Data Packages for Reprocurement Bids.

EXTRA POLICY CONSIDERATION

- Gov’t Wants Contractors to Run With and Commercialize Items and Processes Developed With Gov’t Funding. We Let Them Patent Inventions and Enforce Copyrights in Software. Commercialized Items Come Back to Us Improved and at Lower Cost.

POLICY DIFFERENCES BETWEEN MILITARY & CIVILIAN

- Civilian Agencies Say “Keep Your Proprietary Data If You Don’t Want Us to Use It Against You.”
- Military Departments Say “Give Us Your Proprietary Data. We May Need It in Case of a Military Emergency. We Promise Not to Use It Against You.”

BASIC POLICIES
COMMERCIAL ITEMS

- Preference for Commercial Items, Components or Processes.
- DOD Shall Acquire Only the Tech Data Customarily Provided to Public With a Commercial Item.

BASIC POLICIES
COMMERCIAL ITEMS

- DOD Shall Acquire Only the Tech Data Customarily Provided to Public With a Commercial Item, Except Tech Data that
  - Are Form, Fit or Function Data.
  - Are Required for Repair, Maintenance or Installation, or Customary Data Is Not Sufficient for Military Purposes.
  - Describe Modifications Made at Gov't Expense to Commercial Item to Meet Gov't Requirements.

BASIC POLICIES
COMMERCIAL ITEMS

- **Presumption that Commercial Items Are Developed at Private Expense.**

BASIC POLICIES
NONCOMMERCIAL ITEMS

- **DOD Policy Is to Acquire Only the Tech Data, and Rights in that Data, Necessary to Satisfy Agency Needs**
  - **Offerors Shall Not Be Required to Sell or Relinquish to Gov't Any Rights in Tech Data Related to Items, Components or Processes Developed at Private Expense. (But, We May Inform that Life Cycle Costs Are a Major Factor).**

BASIC POLICIES
NONCOMMERCIAL ITEMS

- **DOD Policy Is to Acquire Only the Tech Data, and Rights in that Data, Necessary to Satisfy Agency Needs**
  - **Offerors and Contractors Shall Not Be Prohibited or Discouraged From Furnishing or Offering to Furnish Items Developed at Private Expense Solely Because Gov't's Rights to Use, Modify, Reproduce, Etc. Tech Data Pertaining to Those Items May Be Restricted.**

BASIC POLICIES
NONCOMMERCIAL ITEMS

- **DOD Policy Is to Acquire Only the Tech Data, and Rights in that Data, Necessary to Satisfy Agency Needs**
  - **Major Systems Development Solicitations Shall Not Require Proposals that Would Permit Gov't to Acquire Competitively Items Identical to Items Developed at Private Expense Unless Determined at Higher Level that Offeror Will Not Be Able to Meet Military Needs.**

BASIC POLICIES
NONCOMMERCIAL ITEMS

- **DOD Policy Is to Acquire Only the Tech Data, and Rights in that Data, Necessary to Satisfy Agency Needs**
  - **Data Needs Must Give Consideration to Contractor's Economic Interests in Data Related to Items Developed at Private Expense, Gov't's Costs to Acquire and Maintain Data, Reprocurement Needs, Repair and Maintenance Needs, and Whether Procurement Can Be Accomplished on a Form, Fit or Function Basis.**

BASIC POLICIES
NONCOMMERCIAL ITEMS

- DOD Policy Is to Acquire Only the Tech Data, and Rights in that Data, Necessary to Satisfy Agency Needs
  - Data Managers Must Balance Original Assessment of Gov't's Data Needs With (Lower) Data Prices Contained in an Offer Where Gov't Receives Lesser Rights.

TYPES OF RIGHTS

“LICENSES, NOT OWNERSHIP”

TYPES OF RIGHTS

- Unlimited Rights
- Limited Rights
- Restricted Rights (Noncommercial Computer Software Only)
- Government Purpose Rights (GPR)
- Specifically Negotiated License Rights

DEFINITION

- **Unlimited Rights**
  - **Rights to Use, Modify, Reproduce, Perform, Display, Release or Disclose in Whole or in Part, in Any Manner, and for Any Purpose Whatsoever, and to Have or Permit Others to Do So.**

DEFINITION

- **Limited Rights**
  - **Rights to Use, Modify, Reproduce, Release, Perform, Display or Disclose Tech Data, in Whole or in Part, Within the Gov't. Gov't May Not, Without Written Permission of the Party Asserting Limited Rights,**

DEFINITION

- **Limited Rights,** **Gov't May Not Cont.**
  - **Release or Disclose Tech Data Outside the Government.**
  - **Use Tech Data for Manufacture.**
  - **Authorize Tech Data Be Used by Another Party.**

DEFINITION

- Limited Rights, Cont.
  - Except that, Government May Reproduce, Release or Disclose Technical Data, or Authorize Use or Reproduction by Persons Outside Government If
    - Necessary for Emergency Repair and Overhaul; Or

DEFINITION

- Limited Rights, Exceptions Cont.
  - A Release or Disclosure of Tech Data (Other Than Detailed Manufacturing or Process Data) to, or Use of Such Data by, a Foreign Government that Is in the Interest of the Gov't and Is Required for Evaluational or Informational Purposes.

DEFINITION

- Limited Rights, Exceptions Cont.
  - Both Exceptions Further Subject To
    - A Prohibition on the Further Release, Disclosure, or Use of the Tech Data; and,
    - The Contractor or Subcontractor Asserting the Restriction Is Notified of Such Reproduction, Release, Disclosure or Use.

DEFINITION

- **Restricted Rights**
  - **Apply Only to Noncommercial Computer Software, and Mean the Gov't's Right To**
    - **Use a Computer Program With One Computer at One Time.**
    - **Transfer a Computer Program to Another Gov't Agency If Transferor Destroys All Copies and Notifies Licensee.**

DEFINITION

- Restricted Rights, Cont.
  - Make Minimum Copies Required for Safekeeping (Archives), Backup Purposes or Modification Purposes.
  - Modify Computer Software Provided that Modified Software Subject to Same Restrictions.

DEFINITION

- Restricted Rights, Cont.
  - Permit Contractors to Diagnose and Correct Deficiencies or Modify to Work With Other Computer Programs, Subject to Notice Requirements.
  - Permit Contractors to Use Computer Programs to Perform Emergency Repairs, Subject to Notice Requirements.

DEFINITION

- Government Purpose Rights (GPR)
  - Rights to Use, Modify, Reproduce, Release, Perform, Display or Disclose Within the Gov't Without Restriction; and,
  - Release or Disclose Outside Gov't and Authorize Persons to Whom Release Is Made to Use, Modify, Etc. For U.S. Gov't Purposes.

DEFINITION

- Specifically Negotiated License Rights
  - Standard License Rights Modified to Provide Such Rights as Parties Deem Appropriate; but,
  - Not Less Than Limited Rights; and,
  - Must Be Identified In a License Agreement Made Part of Contract.

DEFINITION

- **Developed (Technical Data)**
  - **Means that an Item, Component or Process Exists and Is Workable. Workability Means Has Been Sufficiently Tested to Demonstrate to Reasonable People in the Art that There Is a High Probability that Will Work As Intended. Need Not Be Commercially Ready or Actually Reduced to Practice.**

DEFINITION

- **Developed (Computer Software)**
  - **Means that a Computer Program Has Been Successfully Operated in a Computer and Sufficiently Tested to Demonstrate to Reasonable People Skilled in the Art that the Program Can Reasonably Be Expected to Perform Its Intended Purpose.**

DEFINITION

- **Developed Exclusively at Private Expense**
  - **Means Development Was Accomplished Entirely With Costs Charged to Indirect Cost Pools, Costs Not Allocated to a Gov’t Contract, or Any Combination of the Two.**

DEFINITION

- Developed Exclusively With Government Funds
  - Means Development Was Not Accomplished Exclusively or Partially at Private Expense

DEFINITION

- **Developed With Mixed Funding**
  - **Means Development Was Accomplished Partially With Costs Charged to Indirect Cost Pools and/or Costs Not Allocated to a Gov't Contract, and Partially With Costs Charged Directly to a Gov't Contract.**

DEFINITION

- **Commercial Computer Software**
  - **Means Software Developed or Regularly Used for Nongov't Purposes Which:**
    - **Has Been Sold, Leased or Licensed to the Public.**
    - **Has Not Been Offered or Sold, but Will Be Available for Commercial Sale in Time to Satisfy Contract Delivery Req's.**
    - **Satisfies Either of the Above and Would Require Only Minor Modification to Meet Contract Requirements.**

POLICY CONSIDERATIONS

RESULTING POLICY

SOURCE OF FUNDING
+
WHEN “DEVELOPED”

UNLIMITED RIGHTS

TECHNICAL DATA

BASIC CLAUSE IS DFARS 252.227-7013

GOV'T GETS UNLIMITED RIGHTS IN TECHNICAL DATA

- **Pertaining to Items, Components, or Processes Which Have or Will Be <u>Developed Exclusively With Government Funds</u>.**

GOV'T GETS UNLIMITED RIGHTS IN TECHNICAL DATA, CONT.

- Studies, Analyses, Test Data or Similar Data Produced for Contract When Work Was Specified As an Element of Performance.

GOV'T GETS UNLIMITED RIGHTS IN TECHNICAL DATA, CONT.

- **Created Exclusively With Gov't Funds in Performance of Contract that Does Not Require Development or Manufacture of Items, Components or Processes.**

GOV'T GETS UNLIMITED RIGHTS IN TECHNICAL DATA, CONT.

- **Form, Fit and Function Data.**
- Necessary for Installation, Operation, Maintenance or Training (typically manuals).
- **Corrections or Changes to Tech Data Furnished by Gov't.**

GOV'T GETS UNLIMITED RIGHTS IN TECHNICAL DATA, CONT.

- Otherwise Publicly Available or Have Been Released or Disclosed by Contractor Without Restriction.
- Gov't Has Obtained Unlimited Rights Under Another Contract or From Negotiations.

GOV'T GETS UNLIMITED RIGHTS IN TECHNICAL DATA, CONT.

- Furnished to Gov't Under Gov't Contract With Gov't Purpose License Rights or Limited Rights and Restrictive Conditions Have Expired.

COMPUTER SOFTWARE

BASIC CLAUSE IS DFARS 252.227-7014

GOV'T GETS UNLIMITED RIGHTS IN COMPUTER SOFTWARE

- **Developed Exclusively With Government Funds.**
- **Computer Software Documentation Required to Be Delivered Under Contract.**

GOV'T GETS UNLIMITED RIGHTS IN COMPUTER SOFTWARE, CONT.

- Corrections or Changes to Computer Software or Documentation Furnished to Contractor by Gov't.
- Computer Software or Documentation Otherwise Publicly Available.

GOV'T GETS UNLIMITED RIGHTS IN COMPUTER SOFTWARE, CONT.

- Obtained With Unlimited Rights Under Another Gov't Contract or From Negotiations.
- Restricted Rights Have Expired.

GOVERNMENT PURPOSE RIGHTS

TECHNICAL DATA

BASIC CLAUSE IS DFARS 252.227-7013

GOV'T GETS GOV'T PURPOSE RIGHTS IN TECHNICAL DATA

- GPR for Five Year Period, or Other Negotiated Period, in Tech Data Pertaining to Items Which Have or Will Be <u>Developed With Mixed Funding</u> Except Where Gov't Otherwise Entitled to Unlimited Rights.

GOV'T GETS GOV'T PURPOSE RIGHTS IN TECHNICAL DATA, CONT.

- **Created With Mixed Funding in Performance of Contract that Does Not Require Development or Manufacture of Items, Components or Processes.**

COMPUTER SOFTWARE

BASIC CLAUSE IS DFARS 252.227-7014

GOV'T GETS GOV'T PURPOSE RIGHTS IN COMPUTER SOFTWARE

- **GPR for Five Year Period, or Other Negotiated Period, in Computer Software <u>Developed With Mixed Funding.</u>**

LIMITED RIGHTS

TECHNICAL DATA

BASIC CLAUSE IS DFARS 252.227-7013

GOV'T GETS LIMITED RIGHTS IN TECHNICAL DATA

- Pertaining to Items, Components or Processes Developed Exclusively at Private Expense and Marked With a Proper Limited Rights Legend.
- Created Exclusively at Private Expense in Performance of a Contract that Does Not Require Development or Manufacture of Items, Components or Processes.

RESTRICTED RIGHTS

COMPUTER SOFTWARE

BASIC CLAUSE IS DFARS 252.227-7014

GOV'T GETS RESTRICTED RIGHTS IN COMPUTER SOFTWARE

- **Required to Be Delivered or Otherwise Provided Under Contract and that Were <u>Developed Exclusively at Private Expense.</u>**

SPECIFICALLY NEGOTIATED LICENSE RIGHTS

(ALSO CALLED NONSTANDARD LICENSE RIGHTS)

TECHNICAL DATA

BASIC CLAUSE IS DFARS 252.227-7013

SPECIFICALLY NEGOTIATED LICENSE RIGHTS TO TECHNICAL DATA

- Standard License Rights May Be Modified by Mutual Agreement, but Shall Not Provide Gov't Lesser Rights Than Limited Rights.
- Any Negotiated Rights Must Be Identified in a License Agreement Made Part of the Contract.

COMPUTER SOFTWARE

BASIC CLAUSE IS DFARS 252.227-7014

SPECIFICALLY NEGOTIATED LICENSE RIGHTS TO COMPUTER SOFTWARE

- Standard License Rights May Be Modified by Mutual Agreement, but Shall Not Provide Gov't Lesser Rights Than Restricted Rights.
- Any Negotiated Rights Must Be Identified in a License Agreement Made Part of the Contract.

COMMERCIAL COMPUTER SOFTWARE

BASIC CLAUSE IS THERE IS NO CLAUSE

LICENSE RIGHTS TO COMMERICAL COMPUTER SOFTWARE

- The Same as Customarily Provided to the Public.
- Unless Inconsistent with Federal Procurement Law or Do Not Otherwise Satisfy User Needs.
- Disputes Clause is Primary Inconsistent Federal Procurement Law

ESTABLISHING RIGHTS

MARKING REQUIREMENTS

MARKING REQUIREMENTS

- **Contractors May Only Assert Restrictions on Gov't Rights to Use, Modify, Reproduce, Release, Perform, Display or Disclose Tech Data and Computer Software by Marking the Tech Data or Computer Software to Be Delivered With an Approved Legend. See Clauses for Approved Legends.**

IDENTIFICATION AND ASSERTION OF USE, RELEASE OR DISCLOSURE RESTRICTIONS

IDENTIFICATION AND ASSERTION OF USE, RELEASE OR DISCLOSURE RESTRICTIONS

- **Before Award**
  - **Offers Must, to the Extent Known at Time Offer Is Made, Identify Tech Data or Software Which Offeror Asserts Should Be Furnished to Gov't With Restrictions.**
  - **Offeror's Assertions Must Be Submitted As Attachment to Offer, Dated and Signed by Officer of Offeror**

IDENTIFICATION AND ASSERTION OF USE, RELEASE OR DISCLOSURE RESTRICTIONS

- **At Award**
  - **Tech Data or Software Asserted by Contractor that Should Be Furnished to Gov't With Restrictions Must Be Identified in Attachment to Contract.**

IDENTIFICATION AND ASSERTION OF USE, RELEASE OR DISCLOSURE RESTRICTIONS

- After Award
  - Other Assertions May Be Identified After Award When Based on New Information or Inadvertent Omissions Unless the Inadvertent Omissions Would Have Materially Affected the Source Selection Decision.
  - Must Be Submitted As Soon As Practicable and Signed and Dated by Contractor Official.

DISPUTES

COMMERCIAL ITEMS

- Presumption that Commercial Items Are Developed at Private Expense.
- DOD Shall Not Challenge Assertions Unless DOD Can Show Items Were Not Developed Exclusively at Private Expense.

SUPPORTING RECORDS

- Contractor or Sub at Any Tier Responsible for Maintaining Records to Justify Validity of Restrictive Markings.
- Except for Contracts for Commercial Items, Contractor or Sub Must Be Prepared to Furnish Written Justification in Response to CO Challenge.

PRECHALLENGE REQUEST FOR INFORMATION

- CO May Request and Review Supporting Information.

CHALLENGE

- If CO Determines Grounds for Challenge Exist, May Issue Challenge and Require Response From Contractor.
- Contractor's Response Considered Claim Under Contract Disputes Act.
- If CO Determines Validity of Restrictive Marking Not Justified, Shall Issue a Final Decision to that Effect.

CHALLENGE
CONT.

- Gov’t Nevertheless Bound by Restrictive Marking for 90 Days From Issue of Final Decision, Or
- If Contractor Gives Notice of Intent to Appeal or to File Suit, Gov’t Is Bound by Restrictive Markings Pending Final Disposition of Appeal or Suit.

CHALLENGE
CONT.

- **Gov’t’s Ability to Challenge Applies Only to Tech Data and Computer Software Delivered or Required to be Delivered Under Contract.**

DURATION OF GOV'T RIGHT TO CHALLENGE

- **Within 3 Years of Final Payment on Contract or Within 3 Years of Delivery of Tech Data or Computer Software to Gov't, Whichever Is Later, CO May Review and Determine to Challenge Restriction.**
- **At Any Time Tech Data or Computer Software Is Publicly Available, Has Been Furnished to Gov't Without Restriction, or Has Otherwise Been Made Available W/O Restriction.**

WITHHOLDING OF PAYMENT

- **CO May Withhold up to 10 Percent of Contract Price Pending Correction or Replacement of Nonconforming Tech Data or Negotiation of Equitable Reduction in Contract Price.**

SMALL BUSINESS INNOVATIVE RESEARCH (SBIR) PROGRAM

- **New Definition**
  - **SBIR Data Rights Means a Royalty-Free License for Gov't, Including Support Service Contractors, to Use, Modify, Reproduce, Release, Perform, Display or Disclose Tech Data or Computer Software Made Under Contract for Any Gov't Purpose.**

SMALL BUSINESS INNOVATIVE RESEARCH (SBIR) PROGRAM

- Gov’t Gets Unlimited Rights
  - Form, Fit and Function Data.
  - Necessary for Installation, Operation, Maintenance, or Training (Other Than Detailed Manufacturing or Process Data).
  - Corrections or Changes to Gov’t-Furnished Tech Data or Software.

SMALL BUSINESS INNOVATIVE RESEARCH (SBIR) PROGRAM

- Gov’t Gets Unlimited Rights, Cont.
  - Otherwise Publicly Available.
  - Gov’t Previously Acquired Unlimited Rights.
  - SBIR Data After Expiration of SBIR Data Rights

SMALL BUSINESS INNOVATIVE RESEARCH (SBIR) PROGRAM

- **Gov’t Gets Limited Rights (Technical Data)**
  - **Not Generated Under Contract and Pertain to Items Developed Exclusively at Private Expense, and Are Marked.**

SMALL BUSINESS INNOVATIVE RESEARCH (SBIR) PROGRAM

- Gov’t Gets Restricted Rights (Computer Software)
  - Noncommercial Computer Software Required to Be Delivered or Otherwise Furnished Under Contract that Were Developed Exclusively at Private Expense.

SMALL BUSINESS INNOVATIVE RESEARCH (SBIR) PROGRAM

- **Gov’t Gets SBIR Data Rights**
  - **All Tech Data or Computer Software Generated Under Contract and Ending 5 Years After Completion of Project From Which Data Was Generated.**
  - **Except for Tech Data and Computer Software for Which We Otherwise Would Have Unlimited Rights.**

SMALL BUSINESS INNOVATIVE RESEARCH (SBIR) PROGRAM

- **SBIR Data Rights**
  - **Gov't May Not Release or Disclose SBIR Data to Any Person, Other Than Support Services Contractors, Without Permission of Contractor, or for Evaluation Purposes, or for Emergency Repair or Overhaul.**
  - **Support Services Contractors Must Sign Non-Disclosure Agreement or be Subject to 252.227-7018 Clause.**

SMALL BUSINESS INNOVATIVE RESEARCH (SBIR) PROGRAM

- Specifically Negotiated License Rights.
- Prior Government Rights.
- Rights in Derivative Computer Software or Computer Software Documentation
- Third Party Copyrighted Tech Data and Computer Software.

RIGHTS IN SPECIAL WORKS

- When Gov't Has Specific Need to Control Distribution of Works Created Under Contract.
- Normally, Contractor May Run With and Commercialize Tech Data and Computer Software that Gov't Paid For.
- This Is an Exception to that Policy.
- Contractor Claims Copyright and Assigns to Gov't.

ARCHITECT-ENGINEER SERVICES

- When Gov't Needs Exclusive Control of Unique Architectural Design of a Building, a Monument, Etc.
- Gov't Obtains Unlimited Rights in Shop Drawings.

DEFERRED DELIVERY AND DEFERRED ORDERING OF TECH DATA OR COMPUTER SOFTWARE

- **Allows Gov't to Identify Now Tech Data or Computer Software for Which It May Later Require Delivery. Expires 2 Years After Delivery of Last Item. Not Automatic Right. Clause Must Be Added.**
- **Allows Gov't to Later Require Delivery of Tech Data or Computer Software, Not Now Identified, Generated in Performance of Contact or Subcontract. Expires 3 Years After Delivery of Last Item. Not Automatic Right.**

FLOWDOWN OF CLAUSES

- DFARS Provisions Required in All Subcontracts, at All Tiers, Without Alteration Except to Identify Parties.
- Tech Data and Computer Software Normally Delivered to Next Higher Tier Contractor or Sub.
- Subs Delivering Tech Data and Computer Software With Less Than Unlimited Rights May Deliver Directly to Gov't.

WRAP-UP AND REVIEW OF DFARS CLAUSES